

No. 15192

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

JOSEPH M. BRULE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This is an appeal from an order of the District Court denying appellant's motion to vacate and set aside an alleged illegal sentence. The motion was made pursuant to Section 2255, Title 28, U.S.C.

A brief outline of the history of this action as taken from the District Court's record is of assistance

in determining the appellant's position before this Honorable Court.

Appellant and one James Ward were jointly charged in Counts I and III of a three count Indictment returned on March 23, 1955, with having violated Section 2554(a) of Title 26, U.S.C., now Section 4705(a) of Title 26, U.S.C., and Section 2(a) of Title 18, U.S.C. James Ward was charged alone in Count II. The government later dismissed Count III as to defendant Ward after that defendant entered a guilty plea to Counts I and II. Thereafter, a trial was had and a jury returned a verdict of guilty as to Joseph M. Brule on Counts I and III of the Indictment on May 25, 1955. On June 13, 1955, the government filed an Information against Joseph M. Brule charging that as a result of the conviction in the instant case he was a second offender of the Harrison Narcotic Act, having previously been convicted of a similar offense on May 12, 1952.

Thereafter, on the 14th day of June, 1955, Joseph M. Brule, appellant herein, admitted that he was identical with the person previously convicted. The court thereupon sentenced the appellant on Count I of the Indictment in the instant cause to be committed to the custody of the Attorney General of the United States for imprisonment in such institution as

the Attorney General of the United States or his authorized representative may by law designate for the period of seven years and to pay a fine of one dollar, and suspended the imposition of sentence on Count III, placing the appellant on probation for a period of five years commencing on the first day following his release from service of the sentence on Count I, all as set forth in the Judgment, Sentence, Commitment and Order of Probation dated June 14, 1955.

Thereafter, the record discloses that on September 6, 1955, the Court entered an order denying a letter application of the appellant for reduction of his sentence. The record then discloses that the appellant on March 26, 1956, filed in the District Court his "Motion to Vacate and Set Aside the Illegal Sentence on Count One of the Indictment", praying relief under Section 2255, Title 28, U.S.C. It is from the order of the District Court denying the relief prayed for in said motion, entered May 15, 1956, that Joseph M. Brule filed Notice of Appeal to this Honorable Court on June 6, 1956.

SUMMARY OF ARGUMENT

Although the appellant's Points on Appeal will be examined separately hereinafter, a review of the rec-

ord herein makes it immediately apparent that Joseph M. Brule is attempting by this proceeding to contest the sufficiency of the evidence to sustain the verdict of the jury and the sentence imposed in the District Court. It is respectfully submitted that the question of the sufficiency of the evidence to sustain a conviction and sentence thereupon may not be raised by motion under Section 2255 of Title 28, U.S.C. The appropriate remedy available to the appellant in this regard was by direct appeal from the Judgment and Sentence. No such appeal was taken herein. *Hanley v. United States* (D.C. 222) F. 2d 566; *United States v. Segelman* (C.A. 3) 212 F. 2d 88; *Crawford v. United States* (C.A. 6) 219 F. 2d 478.

ARGUMENT

1. Appellant's first point is that there was no probable cause for the arrest, detention and conviction on Count I of the Indictment. It is first noted that the prosecution herein was by way of Grand Jury indictment. It further appears from the Commissioner's Transcript on file herein, that promptly after his arrest the appellant was brought before that magistrate, advised of the nature of the charge pending against him, of his right to counsel, and of his right to post bond. Appellant's argument in this area, there-

fore, is without merit. Secondly, the record demonstrates that appellant's arraignment on the Indictment was twice continued to allow him the opportunity of arranging for his own counsel. This he did and the appellant thereafter proceeded to a jury trial with the aid and assistance of counsel of his own choosing. Thereafter, the jury returned a verdict of guilty as to the count in the Indictment of which he complains and subsequently the District Court entered the Judgment and Sentence hereinabove referred to. In short, Joseph M. Brule had his day in court and any complaint he may have had concerning the sufficiency of the evidence could only have been heard in this Court through a direct appeal. He failed to avail himself of this remedy. (Note cases cited in Summary of Argument)

2. The appellant next contends that he was denied equal protection of the law. In support of this proposition, appellant has cited the Fourteenth Amendment to the Constitution of the United States. It is respectfully noted that the appellant's contentions here are basically identical with those set forth in his first point raised on appeal which, together with appellee's argument against the same, are set forth in the next preceding section of this brief.

Appellant cites in his brief a portion of the reporter's transcript of the testimony of James Ward,

his co-defendant and *a defense witness*, and relies on this testimony in support of the proposition that there was no evidence upon which the jury could convict him on Count I of the Indictment. The appellant overlooks or chooses to ignore the fact that this, together with all other evidence of the case, was presented to the jury for its consideration in arriving at its verdict. We specifically note here and invite the Court's attention to the testimony of Federal Narcotic Agent Charles S. Montgomery which is in direct conflict with the cited portion of Witness Ward's testimony. We presume that the jury returned its verdict after evaluating *all* of the evidence in the case.

In any event, the appellant's remedy for relief under this contention was by an appropriate and timely appeal from the Judgment and Sentence of the District Court.

3. The appellant last urges that undenied contentions must be admitted as true. The appellant here alludes to the fact that in the order of May 15, 1956, from which this appeal is taken, the learned trial judge did not attempt to refute all of the allegations in support of the appellant's motion. From what has been said hereinabove and as is demonstrated by the record of this cause, it is apparent, as it was to the District

Court, that, on its face, the motion sought relief that the moving party was not entitled to. Accordingly, the Court did not make findings of fact or conclusions of law as none were required. *Crawford v. United States* (C.A. 6) 219 F. 2d 478.

CONCLUSION

The appellant, Joseph M. Brule, was tried and convicted by a jury of his peers. He was represented during the trial and the subsequent sentencing of the Court by counsel of his own choosing. Long after the time for appeal had run, he attempted to attack the adequacy of the proceedings and the sufficiency of the evidence against him by way of a motion made pursuant to Section 2255, Title 28, U.S.C. It is respectfully submitted that the provisions of that section have no application to the factual situation in this case. Hence, the appellant is not entitled to the relief he prays. The Order of the District Court entered May 15, 1956, should therefore be affirmed.

Respectfully submitted,

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